# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 25, 2014 |
| v | No. 313669<br>Wayne Circuit Court |
| KEVIN WILKINS,<br><br>Defendant-Appellant. | LC No. 10-003843-FH |

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant Kevin Wilkins appeals of right the trial court's order denying his motion for a new trial on the ground that he did not receive the effective assistance of counsel. Wilkins moved for a new trial after the trial court sitting as the finder of fact convicted him of resisting or obstructing a police officer causing injury, MCL 750.81d(2), and resisting or obstructing a police officer, MCL 750.81d(1). The trial court sentenced Wilkins to serve five days in jail with credit for five days served. Because we conclude there were no errors warranting relief, we affirm.

## I. BASIC FACTS

This case arose from an investigation into a carjacking. Officer Leroy Huelsenbeck testified that he was on routine patrol when he saw Wilkins driving a vehicle that fit the description of the one involved in the carjacking. As Huelsenbeck turned to stop the vehicle, it slowed and Wilkins and two rear passengers got out and ran. Huelsenbeck saw Wilkins flee, but chose to pursue the rear passengers because Wilkins appeared "older" and "heavier" and likely "wouldn't get far."

Sergeant Robert Avery testified that he was working in the area and went to assist. He saw an officer, Brandon Pettit, chasing Wilkins westbound on Fenkell. Avery saw Wilkins charging at Pettit with his head down as if to tackle him. Wilkins resisted Pettit's attempts to handcuff him and, as Avery tried to assist, Wilkins struck Avery on the left temple. Avery suffered a concussion and had partial vision loss for a period of two and a half weeks. It ultimately took six officers to subdue Wilkins.

Sergeant Joseph Turner, Jr., testified that he interviewed Wilkins after his arrest. Wilkins told him that he was "running down the street going to the store when the police told me to stop." He said that he was scared when the officer told him to get on the ground and, instead of complying, he waived his arms before the officer threw him to the ground. Wilkins continued to move only because he was scared.

Wilkins testified that he was just running to the store to buy potatoes when he heard a siren and saw police officers. The officers told him to lie on the ground, but before he could do so they began hitting him. He conceded that he was waving his arms around in an attempt to get the officers off him.

Following Wilkins' trial, but before sentencing, Todd Kaluzny substituted as his lawyer in place of his trial lawyer, Sequoia Dubose. Kaluzny then moved for a new trial.

In an affidavit attached to the motion, Dedric Adams averred that he was working at a barbershop near the area where Wilkins was arrested. He saw Wilkins walking down the street when officers stopped and ordered Wilkins to put his hands up and "freeze." Officers from another car pulled up, got out, and tackled Wilkins "for no reason while he had his hands up." The officers were "extremely brutal" and "beat him up." The trial court denied Wilkins motion for a new trial and denied a subsequent motion again asking for a new trial or an evidentiary hearing to determine whether Wilkins' trial lawyer rendered ineffective assistance.

Wilkins appealed to this Court on the ground that he did not receive the effective assistance of counsel. This Court determined that Dubose's failure to interview Adams "appears objectively unreasonable and inconsistent with sound trial strategy."[1] Accordingly, it remanded the case to the trial court for an evidentiary hearing "to explore defendant's claims that his mental impairment rendered him a less than fully competent witness,[2] and that Adams's testimony would have completely exonerated him from the charges of assaulting, resisting or obstructing a police officer."

At the evidentiary hearing, Dubose testified that he had Adams' name and contact information and knew that Adams might be able to provide exculpatory testimony. He spoke with Adams on the phone and thought that he might make a credible witness, but had not met Adams in person. Dubose testified that Adams told him that he saw Wilkins' arrest and did not see Wilkins resist.

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[1] *People v Wilkins*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2012 (Docket No. 302679).

[2] Wilkins' mental competency was not, however, at issue in the prior appeal. At the evidentiary hearing, Wilkins' lawyer conceded as much and clarified that it was merely his position that, given Wilkins' limitations, it would have been far better to call Adams to the stand in Wilkins' place. Therefore, we shall limit our analysis to that context.

Adams testified at the hearing and said he looked outside after he heard helicopters and saw flashing lights. He saw Wilkins walking down the street when police officers drove up and ordered him to put his hands up. As Wilkins complied with the order, another car pulled up and an officer jumped out, tackled Wilkins, and "attacked him." Adams testified that Wilkins never hit, punched, or kicked any of the officers and did not flail his arms. Rather, eight white officers "beat him up real bad," kicking and punching him in the head and body. He said that, as the white officers beat Wilkins, another 8 to 10 officers—some of whom were black—stood by laughing. By his count, there were more 20 police officers at the scene.

The trial court found Adams' testimony to be inconsistent and unworthy of credibility: "[t]he Court doesn't believe Adams now and wouldn't have believed Adams then." It denied Wilkins' motion for a new trial premised on ineffective assistance because, even if Adams had testified at trial, his testimony would not have changed the outcome.

## II. INEFFECTIVE ASSISTANCE

### A. STANDARDS OF REVIEW

On appeal, Wilkins again argues that his trial lawyer's decision not to call Adams constituted ineffective assistance. Because he did not receive effective assistance, he maintains that this Court must grant him a new trial. This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). For claims of ineffective assistance, this Court reviews de novo whether a defendant's lawyer's act or omission fell below an objective standard of reasonableness under prevailing professional norms and prejudiced his or her client's trial. *People v Gioglio (On Remand)*, 296 Mich App 12, 19-20; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864. This Court, however, reviews the factual findings underlying the trial court's decision for clear error. *Id.* at 20.

### B. ANALYSIS

In order to establish a claim of ineffective assistance of counsel, a defendant must show that his or her trial lawyer's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the unprofessional error, the result of the proceeding would have been different. *Id.* at 22.

Here, Wilkins' trial lawyer, Dubose, admitted that he knew about Adams and "dropped the ball" by not using him as a witness; he explained that he "just didn't follow up" and "forgot." Accordingly, we shall assume that the decision not to call Adams was not a matter of trial strategy. We shall further assume, without deciding, that the failure to call Adams fell below an objective standard of reasonableness under prevailing professional norms. *Id.* As such, the only question is whether this omission prejudiced Wilkins' trial—that is, whether there is a reasonable probability that, had Dubose called Adams to testify, the outcome would have been different. *Id.*

Under the prejudice prong, "it is not enough that the defendant showed that the act or omission had some conceivable effect on the outcome of the proceeding." *Id.* at 23 (quotation marks and citation omitted). Rather, the defendant must demonstrate that, given the totality of the evidence presented at trial, there is a reasonable probability that the outcome would have been different. *Id.*

Here, the trial court unequivocally found that Adams' testimony was incredible and, had he testified at the bench trial, the trial court stated that it would not have believed his testimony. The trial court based its finding on the inconsistencies between Adams' version of events and the other testimony and evidence; indeed, the court felt that Adams embellished his testimony. The trial court had the opportunity to observe the original trial, served as the original fact-finder, and further had the opportunity to judge Adams' credibility in person. Because the trial court was in a far superior position to assess Adams' credibility, we must defer to its decision to afford no weight to Adams' testimony. *Id.* 27-28 (noting that this Court must generally defer to the trial court's superior ability to judge credibility). Given the trial court's finding with regard to the weight and credibility to be afforded Adams' testimony and the otherwise overwhelming evidence against Wilkins, we cannot conclude that, but for the failure to call Adams, there was a reasonable probability that the outcome would have been different. *Id.* at 22.

## III. CONCLUSION

The trial court did not clearly err when it found Adams' version of events to be incredible. Moreover, because Adams' testimony would not have altered the outcome of Wilkins' trial, Wilkins failed to establish the prejudice prong of his ineffective assistance claim. Consequently, the trial court did not abuse its discretion when it denied Wilkins' motion for a new trial premised on ineffective assistance. *Miller*, 482 Mich at 544.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood